NO. 21,129

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AHMAD WAZIRI,

Petitioner,

v.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

RESPONDENT'S BRIEF

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UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,

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RESPONDENT'S BRIEF

JURISDICTION AND STATEMENT OF THE CASE

The immediate action of respondent upon which the petition filed is based is the order to show cause of February 23, 1966 (R., p. 27). The hearing on this order was held March 9, 1966 (R., p. 20). The decision of the Special Inquiry Officer of March 9, 1966 (R., p. 16) was appealed to the Board of Immigration Appeals. The Board by its decision of July 1, 1966 (R., p. 1) dismissed the appeal, and the administrative action was final. The petition to this Court to review under §106(a) was filed on July 20, 1966.

The specific action of respondent, review of which is sought by petitioner, is the proceeding pursuant to Section 246 (8 USC 1256) to rescind adjustment of status. This proceeding originated by giving notice of intention to rescind (Exhibit 1, R., p. 437), copy of which is Attachment I.

To present the complete picture, respondent sets forth the chronological sequence of the case.

1. October 24, 1959. Petitioner entered the United States at New York for a period of one year, as a nonimmigrant student.

2. October 13, 1960. He married Mary Elizabeth Herzog at Carson City, Nevada.

3. November 3, 1960. She filed a petition to accord him nonquota status (Section 101(a)(27)(A) of the Act, 8 USC 1101(a)(27)(A)).

4. November 23, 1960. The petition was approved.

5. December 19, 1960. He filed application for status as a permanent resident under Section 245 (8 USC 1255).

6. February 1, 1961. Permanent resident status granted.

7. February 7, 1961. He filed a complaint for divorce in San Francisco.

8. March 3, 1961. An interlocutory decree was entered.

9. March 5, 1962. Final decree entered.

10. June 5, 1963. A notice of intention to rescind adjustment of status under Section 246 of the Act was served on petitioner (R., p. 273), (Attachment I).

11. October 17, 1963. Hearing held in rescission proceedings (R., p. 272).

12. April 8, 1964. Decision of the Special Inquiry Officer rescinding status of permanent resident (R., p. 264), copy of which is Attachment II.

13. July 24, 1964. Appeal to the Board of Immigration Appeals was dismissed (R., p. 241), copy of which is Attachment III.

14. October 2, 1964. Respondent issued an order to show cause why petitioner should not be deported. The hearing was noticed for October 28, 1964 and then rescheduled, continued to November 20, 1964.

15. November 19, 1964. Petitioner filed a motion with the Board of Immigration Appeals to reopen the rescission proceeding (R., p. 215) on November 20, 1964. Following the hearing on

the order to show cause, petitioner was allowed voluntary departure by the Special Inquiry Officer.

16. January 15, 1965. The Board of Immigration Appeals granted the motion to reopen, and withdrew the order of July 24, 1964 (R., p. 205).

17. April 2, 1965. Further proceedings before the Special Inquiry Officer on the reopening (R., pp 99-168).

18. June 3, 1965. Decision of the Special Inquiry Officer (R., pp 90-98). No change in his decision of April 8, 1964. Copy is Attachment IV.

19. December 13, 1965. Decision of the Board of Immigration Appeals dismissing appeal (R., pp. 31-34). Copy is Attachment V.

20. January 3, 1966. Petitioner filed a petition to review, No. 20,637.

21. February 18, 1966. By stipulation, the deportation order of November 2, 1964 was vacated by order of this Court, without prejudice to the institution of new deportation proceedings, based upon the rescission order of June 3, 1965.

22. February 23, 1966. Respondent issued an

order to show cause and notice of hearing, directing petitioner to show cause, on March 9, 1966, why he should not be deported pursuant to Section 241(a)(2), (R., p. 27).

23. March 9, 1966. Hearing before the Special Inquiry Officer (R., p. 20) and the decision of the Special Inquiry Officer allowing voluntary departure (R., p. 16).

24. July 11, 1966. Order of the Board of Immigration Appeals dismissing appeal (R., p. 1.)

25. July 20, 1966. Petition for review filed.

Although a proceeding under Section 246 of the Act to rescind adjustment of status may not be immediately related to a final order of deportation, in this case, upon the final determination of rescission, petitioner's stay in the United States was longer than authorized, and he became deportable under Section 241(a)(2), (8 USC 1251(a)(2)), of the Act. The determination made was "during and incident to the administrative proceeding, conducted

"by a Special Inquiry Officer.",

Foti v. INS
375 US 217

Giova v. Rosenberg
379 US 18

and within the ambit of Section 106(a) (8 USC 1105(a)).

However, there is a caveat. Section 246(a) provides:

> "If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 245 or 249 of this Act or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken * * * and the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made."

The section specifically requires:

> "It shall appear to the satisfaction of the Attorney General".

Section 242(b) of the Act states the requirements with regard to proceedings before a

Special Inquiry Officer. Subdivision 4 provides:

> "(4). No decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence."

The Supreme Court in Woodby v. INS and Sherman v. INS, Nos. 4 and 80, October Term 1966, on December 12, 1966, 385 US 276, has stated the rule that (p. 286):

> "no deportation order may be entered unless it is found by clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true. (Emphasis supplied.)

It is respondent's position that the measure of the deportation order is the standard of Woodby and Sherman, but the measure of the rescission is the "satisfaction" of the Attorney General.

SPECIFICATION OF ERROR

The specification of error is directed to the decision of the Special Inquiry Officer in the rescission proceedings and Section 246, and charges said decision was not supported by reasonable, substantial and probative evidence on the administrative record considered as a whole.

THE QUESTION PRESENTED

1. What is the standard of proof applicable to the proceedings under Section 246?

2. Has the rescission been determined in accordance with the applicable standard?

STATUTES

§242(b)(4)	8 USC 1252(b)(4)
§245	8 USC 1255
§246	8 USC 1256

Section 101(a)(27)(A), PL-89, 236, October 31, 1965, 79 Stat. 916, substituted "special immigrant" for nonquota immigrant, and deleted "child" and "spouse".

Section 201 was amended by the same Act:

> "(b) The 'immediate relatives' referred to in subsection (a) of this section shall mean the children, spouses, and parents of a citizen of the United States."

ARGUMENT

1. The Applicable Standard Of Proof.

The Court will note that there are two separate proceedings involved in this review. The

first is the proceeding pursuant to Section 246, and the second is the proceeding pursuant to Section 242(b):

A. Section 242(b).

The statute has specifically provided in Section 106(a)(4) and Section 242(b):

> "The petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive."

The Supreme Court in Woodby v. INS and Sherman v. INS, supra, has now determined that the above quoted portion of Sections 106(a)(4) and 242(b)(4) is addressed to the scope of judicial review, and not to the degree of proof required in deportation proceedings, and that the applicable burden of proof, or standard of persuasion, expressed by the Court in the last paragraph of his Opinion, page 286, is as quoted above.

The order to show cause (R., pp 27-29) alleges that petitioner:

"(1) You are not a citizen of national of the United States.
(2) You are a native and citizen of Iran.
(3) You entered the United States at New York about October 29, 1959.
(4) You were admitted for a temporary period as a student until October 23, 1960.
(5) On February 1, 1961 your status was adjusted to that of a permanent resident under the provisions of Section 245 of the Immigration and Nationality Act.
(6) On December 13, 1965, the Board of Immigration Appeals dismissed your appeal from the decision of the Special Inquiry Officer dated June 3, 1965, ordering that no change be made in the decision of April 8, 1964 rescinding the permanent resident status previously granted to you.
(7) You previously informed the Immigration and Naturalization Service that you would not be willing to depart voluntarily.
(8) You have remained in the United States for a longer period than authorized."

The facts as to these charges are supported by evidence that is clear, unequivocal and convincing. Such evidence is also reasonable, substantial and probative.

The attack engendered by the petitioner, therefore, centers on the proceedings conducted under Section 246 of the Act.

B. Section 246

Section 246 is related to the sections of the Act which permit adjustment of status (Sections 244, 245, 249) and looks to withdrawal of suspension in Section 244, and rescission of adjustment under Section 245 or 249, if "it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and canceling deportation in the case of such person, if that occurred, and the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made."

Proceedings under Section 246 are thus seen to be separate from Section 242(b), and may or may not lead to Section 242(b). Upon rescission of status adjustment, the alien may be restored to his original status (a student in this case), and

not be immediately vulnerable to deportation. As in this case, deportation proceedings are commenced by the issuance of the order to show cause. The alien might seek review of the rescission of his adjusted status by resort to judicial review, declaratory judgment in the District Court, (28 USC 2201 or 5 USC 1009), prior to the institution of deportation proceedings.

The next question is obvious: "Is there any difference in the standard in the District Court on review of the Section 246 proceeding, as opposed to the standard in this Court on review under Section 106(a), where the entire record as to both proceedings may be reviewed.

Reasonable, substantial and probative evidence, the Supreme Court says in Woodby, is the scope of review. Respondent concedes that the scope of review should be the same in both Courts.

However, the Supreme Court also says that the burden of persuasion as to the facts alleged

as grounds for deportation is by "clear, unequivocal and convincing evidence."

Section 246 states "if it shall appear to the satisfaction of the Attorney General". As to the scope of review of "the satisfaction of the Attorney General", if it is assumed that it must be founded upon "reasonable, substantial and probative evidence", must the applicable standard be "clear, unequivocal and convincing", and is there any measuring rod for determining, if the Attorney General is satisfied by evidence that is reasonable, substantial and probative, that such evidence is not clear, unequivocal and convincing?

It is the view of the respondent that the imposition of standards to be determined by probing the esoteric meaning of the words "reasonable, substantial and probative, clear, unequivocal and convincing" is an absurdity. Whether what is reasonable, substantial and probative may not be clear, unequivocal and convincing, or whether what is clear and convincing may not be reasonable and substantial and probative, etc., etc., respondent will not probe.

Suffice to say, respondent will submit that the Attorney General was satisfied by reasonable, substantial and probative evidence, and that the deportability of petitioner has been established by evidence that is clear, unequivocal and convincing.

C. The Record.

The record contains four administrative decisions, two by the Special Inquiry Officer and two by the Board of Immigration Appeals.

1. The Special Inquiry Officer's Decision, in rescission proceedings under Section 246 (Attachment II).

The decision notes the following:

Petitioner, a native and citizen of Iran, age 38, admitted to the United States as a student for one year at New York on October 24, 1959.

On October 13, 1960 he married Mary Herzog, an American citizen.

On November 3, 1960 she filed a petition to accord him nonquota status; approved November 23, 1960.

On November 19, 1960 he filed a Section 245 application for status as a permanent resident; granted February 1, 1961.

On February 7, 1961 he filed a complaint for divorce in San Francisco, obtained an interlocutory decree on March 3, 1961 and a final decree March 5, 1962.

Proceedings under Section 246 instituted June 5, 1963.

The Special Inquiry Officer made the following comments (p. 268) (Attachment II):

> "The respondent is a trickster and prevaricator. According to the Form I-20 (Certificate of Eligibility for Nonimmigrant "F" Student Status) which he presented when he came to the United States, he was destined to Utah State University * * * * He never entered the university. Although students are not permitted towork without the approval of the Service, a few months after his arrival he obtained employment. When Mary filed the petition to accord him nonquota status he 'certified' that he was a student and was not working. * * * *
>
> "I carefully observed the respondent during the hearing, and I am satisfied that his veracity had not improved. Except where corroborated, I would not believe any of his testimony. (P. 269). * * *

"The respondent married Mary just before the expiration of the one-year period of his admission. He arranged the situation so he would not have to live with her. He filed his complaint for divorce less than one week after his status here was adjusted. The reasons he gave for the divorce at the trial were completely at variance with those he testified to before me at the hearing. I am satisfied he testified falsely at both proceedings." (PP 270, 271.)

2. The Board of Immigration Appeals dismissed the appeal July 24, 1964 (R., p. 241). (Attachment III.)

3. Petitioner obtained new counsel, and a motion to reopen was filed so that additional evidence could be adduced. The motion was granted.

4. The decision of the Special Inquiry Officer following the reopened hearing (R., p. 90), (Attachment IV), makes the following observation (p. 98):

"In my decision of April 8, 1964, I found the respondent to be a trickster and prevaricator who had married Mary solely to obtain benefits under the immigration laws. None of the evidence adduced at

"the reopened hearing persuades me that these findings were in error. If ever there was a case of a fraudulent marriage, this is it. No change will be made in my previous order."

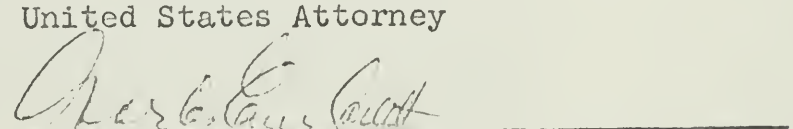
5. The decision of the Board of Immigration Appeals on appeal, December 13, 1965 (R., p. 31) (Attachment V) constituted the fourth review of this record, and dismissed the appeal.

CONCLUSION

It is respectfully submitted that the record contains reasonable, substantial and probative evidence, that more than adequately supports the decision of the Special Inquiry Officer on the proceedings under Section 246 of the Act, and the facts alleged as grounds for deportation have been found by clear, unequivocal and convincing evidence.

Respectfully submitted,

CECIL F. POOLE
United States Attorney

By: 
CHARLES ELMER COLLETT
Chief Assistant United States Attorney

Attorneys for Respondent.

DATED: April 17, 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

= =

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that a copy of the foregoing Respondent's Brief was served upon petitioner by depositing the same in the United States mail at 450 Golden Gate Avenue, San Francisco, California, addressed to the Attorneys for the Petitioner:

WILLIAM C. WUNSCH, Esq.
FAULKNER, SHEEHAN & WISEMAN
1101 Balfour Building
351 California Street
San Francisco, California 94104

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

DATED:
April 17, 1967.

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

NOTICE OF INTENTION TO RESCIND ADJUSTMENT OF STATUS
UNDER SECTION 246 OF THE IMMIGRATION AND NATIONALITY ACT.

UNITED STATES OF AMERICA:

In the Matter of

AHMAD (DANIAL) WAZIRI
Respondent

File No. A12 269 [illegible]
San Francisco, California

To: Ahmad (Danial) Waziri
Col Middle Road
Belmont, California

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;

2. You are a native and citizen of Iran;

3. You last entered the United States at New York, New York on [illegible], 1959 as a nonimmigrant student;

4. On November 23, 1960 a visa petition was approved in your behalf, granting you nonquota immigrant status under Section 101(a)(27)(A) of the Immigration and Nationality Act on the basis of your [illegible] to Mary Elizabeth Horsey;

5. On February 1, 1961 your status was adjusted to that of a permanent resident under Section 245 of the Immigration and Nationality Act on the basis of the nonquota immigrant status granted you on November 23, 1960;

ATTACHMENT

6. Your marriage to Mary Elizabeth Horsey was not a bona fide marriage and was entered into solely for the purpose of evading the immigration laws;

7. On February 1, 1961 a quota immigrant visa under the quota for [illegible] was not immediately available to you.

ON THE BASIS OF THE FOREGOING ALLEGATIONS, it is charged that your adjustment of status from a nonimmigrant to that of a person admitted for permanent residence under Section 245 of the Immigration and Nationality Act is subject to rescission under Section 246 of the Immigration and Nationality Act, because you were ineligible for nonquota immigrant status under Section 101(a)(27)(A) of the Immigration and Nationality Act and an immigrant visa was not immediately available to you on February 1, 1961, the date on which your application for status as a permanent resident was approved.

RALPH H. HOLTON
District Director
San Francisco, California

Dated:
ERT/emk

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File: A12 269 334 - San Francisco, California

In The Matter Of)

AHMAD WAZIRI) IN RESCISSION PROCEEDINGS UNDER SECTION 246
) OF THE IMMIGRATION AND NATIONALITY ACT

Respondent)

IN BEHALF OF RESPONDENT:

Mas Yonemura, Esq.
405 - 14th Street
Oakland 12, California

IN BEHALF OF THE SERVICE:

Stephen M. Suffin, Esq.
Trial Attorney
San Francisco, California

DECISION OF THE SPECIAL INQUIRY OFFICER

The respondent is a native and citizen of Iran, age 38, who was admitted to the United States as a student for a period of one year at New York on October 24, 1959. On October 13, 1960, he was married to Mary Elizabeth Herzog at Carson City, Nevada. On November 3, 1960, she filed a petition to accord him nonquota status. The petition was approved on November 23, 1960. On December 19, 1960, he filed an application for status as a permanent resident under the provisions of Section 245 of the Immigration and Nationality Act. His application was granted on February 1, 1961. On February 7, 1961, he filed a complaint for a divorce in San Francisco, California. An interlocutory decree was entered on March 3, 1961, and a final judgment of divorce granted on March 5, 1962.

ATTACHMENT II

The Service has instituted proceedings to rescind the grant of status of permanent resident to the respondent. Section 246 of the Immigration and Nationality Act provides for the rescission of the grant of status of permanent resident if the alien was not, in fact, eligible for such status. The Service charges that the respondent's marriage to Mary was not a bona fide one, having been entered into solely for the purpose of evading the immigration laws, and that consequently he was not eligible for nonquota status. Section 245 of the Act provides that the status of an alien may be adjusted to that of a permanent resident only if an immigrant visa "is immediately available to him at the time his application is approved." The nonpreference portion of the Iranian quota was greatly oversubscribed at the time the respondent's status was adjusted to that of a permanent resident. Consequently, if he were not then entitled to obtain a nonquota immigrant visa on the basis of his marriage to Mary, he was ineligible for the grant of status of permanent resident.

The respondent was called as a witness and testified along the following lines. He met Mary at a dance during the latter part of December, 1959. Thereafter he saw her about once a week until their marriage in October, 1960. Prior to their marriage they had engaged in satisfactory sexual relations a number of times. She asked him to marry her. He informed her if they married they could not live together because he had an inheritance coming from his father which he could not get unless she became a Moslem and changed her nationality to that of a Persian. He then agreed to

marry her but only on condition that she live with her parents until the matter was settled. They were married a week later. They never lived together but engaged in sexual relations once a week. She was agreeable to this arrangement. At the time of his marriage he had a brother here. He never introduced Mary to his brother as his wife, but as his girl friend. If his brother knew he had married, the brother could get the inheritance which at that time amounted to $100 per month but later became worth $500.

In explaining what led to the divorce, the respondent stated that before he was married he was treated nice and friendly. However, within a week after their marriage, he was treated as a stranger, his wife became cool to him and their sexual relations unsatisfactory. Her father, who hated him, wanted to charge him $40 a month for her support. He also learned for the first time that she had been previously married and in a mental institution. Prior to their marriage she appeared normal, but afterwards became completely different. Although he did not want a divorce, he decided to get one about four or five months after their marriage. He took Mary to his lawyer to discuss this divorce. He did not tell her beforehand why he was taking her to the lawyer because he did not want to hurt her feelings. He insisted that he married Mary because he loved her and that he did not know that by marrying her it would assist him to remain in the United States.

The respondent's former wife, Mary, was called as a witness by the

Government. She testified that she met the respondent at a dance. She then saw him once or twice a week for a period of about three months. During this time she engaged in sexual relations with him. After disappearing for the next three months, he suddenly called her, said he had been to Europe. She was angry with him because she thought she was pregnant when he left. She did not want to see him, but he insisted. He asked her to marry him. Within a couple of days they were married. Before they were married she told him that she had been previously married and had been in an institution. He told her that if he married a non-Moslem his inheritance from his father would go to his brother. She never met his brother. The respondent told her it would only be a couple of weeks until he obtained his inheritance and that she should continue to live at her parents' home. She never lived with the respondent because he did not want her to. Her father became angry when the respondent backed down on paying for her support. After the marriage her feelings toward him had not changed. She wanted to make a home and live with him. She engaged in sexual relations with him after the marriage, but they were no longer satisfactory. He said she was selfish and no good as a mate. One day he took her to his lawyer without explaining why. When she arrived at the lawyer's she was informed that the respondent wished to divorce her. She thought it had something to do with the inheritance. She was reluctant to proceed with the divorce, because she loved her husband. However, she agreed when the lawyer explained that the respondent could get married in Iran without divorcing her, but that she would be unable to remarry without a divorce. There was some dis-

cussion about an annulment of the marriage, but because she thought the respondent might come back to her during the interlocutory period of a year, she did not want the marriage annulled. About a week after obtaining the interlocutory decree he told her he had to leave the United States to get his inheritance. She did not know why he divorced her.

There was introduced as an exhibit a sworn statement which had been taken from Mary on January 16, 1963. The information in the sworn statement was consistent with the testimony she gave before me almost a year later. Her parents were also called as witnesses and corroborated her testimony in its essential aspects.

The respondent is a trickster and prevaricator. According to the Form I-20 (Certificate of Eligibility for Nonimmigrant "F" Student Status) which he presented when he came to the United States, he was destined to Utah State University where he had been accepted for a four-year course of study leading to a degree of bachelor of science with a major in political science. He never entered the university. Although students are not permitted to work without the approval of the Service, a few months after his arrival he obtained employment. When Mary filed the petition to accord him nonquota status he "certified" that he was a student and was not working. Both statements were untrue. In his sworn application for status as a permanent resident, although they had never lived together, he gave the same address for himself and Mary. In this application he also failed to show the places where he had been employed in the United States, revealing only his foreign employment. He told

Mary that if she was questioned by immigration officers, she was to say they were living together but that he was out. At the trial, when the respondent was awarded the interlocutory decree of divorce from Mary, he perjured himself repeatedly; for example - although it was at his insistence that he and Mary had not lived together, he swore that she had separated from him the day after they were married and moved to her parents' house. He went on to say that he had asked her to come back to his house but that she had refused. Although he never lived in San Francisco, he testified at the trial that he had had his residence there for four months. Furthermore, although he testified before me that his brother did not know he was married, his brother appeared as a witness at the trial and corroborated the respondent's testimony. It appears, therefore, that he also suborned his brother to commit perjury.

Although the respondent informed Mary that he would lose his inheritance by marrying a non-Moslem, this was a false statement of Iranian law. After he obtained the interlocutory decree, apparently so he would not be bothered by his wife, he sent her two postcards, one in March and one in April of 1961. In the first card which he mailed from San Francisco, he stated he was leaving for Iran. The second one, which he had someone mail from Iran, indicated that he was in that country.

I carefully observed the respondent during the hearing and I am satisfied that his veracity had not improved. Except where corroborated, I would not believe any of his testimony.

Mary is obviously not very bright and it was clear that she was emotionally

upset about the outcome of her marriage to the respondent. However, she seemed to be trying to give the facts to the best of her ability. If she had intentionally been trying to harm the respondent, she could have easily given testimony much more damaging to him. I am satisfied that her testimony sets forth the true facts in the case.

A marriage entered into by two parties without a bona fide intention of residing together as husband and wife and merely for the purpose of enabling the alien spouse to obtain benefits under the immigration laws, is not a valid marriage for immigration purposes. Matter of Slade, Int. Dec. 1257. Matter of M-, I. & N. Dec. 217. Lutwak v. United States, 344 U.S.604. In the Lutwak case, Justice Minton pointed out that "Congress did not intend to provide aliens with an easy means of circumventing the quota system by fake marriages in which neither of the parties ever intended to enter into the marital relationship." It follows that where the alien is the one without the intention of entering into a bona fide marriage, but deceives the citizen spouse as to his true intention, he also is not entitled to obtain any benefits under the immigration laws on the basis of such marriage.

The respondent married Mary just before the expiration of the one-year period of his admission. He arranged the situation so he would not have to live with her. He filed his complaint for divorce less than one week after his status here was adjusted. The reasons he gave for the divorce at the trial were completely at variance with those he testified to

before me at the hearing. I am satisfied he testified falsely at both proceedings. I have no doubt that he did not have an intention of entering into a bona fide marriage with Mary, that he deceived her, and that he married her solely to obtain benefits under the immigration laws. Consequently, he was not entitled to nonquota status on the basis of his marriage. I find, therefore, that he was not, in fact, eligible for adjustment of status to that of a permanent resident under Section 245 of the Immigration and Nationality Act. The grant of such adjustment will be rescinded.

IT IS ORDERED that the status of permanent resident granted to the respondent pursuant to the provisions of Section 245 of the Immigration and Nationality Act, be rescinded.

Chester Sipkin
Special Inquiry Officer

lb

U. S. DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

JUL 24 1964

File: A-12269334 - San Francisco

In re: AHMAD WAZIRI

IN RESCISSION PROCEEDINGS UNDER SECTION 246 OF THE IMMIGRATION AND NATIONALITY ACT

APPEAL

ORAL ARGUMENT: June 1, 1964
On behalf of respondent: Pro se

On behalf of I&N Service: Irving A. Appleman, Esq.

The special inquiry officer ordered rescission of the grant of permanent resident status given to the respondent under section 245 of the Act. Respondent appeals; the appeal will be dismissed.

Respondent, a 38-year-old married male alien, a native and citizen of Iran, admitted to the United States as a student for a period of one year on October 24, 1959, did not enter school but took employment in January 1960. He married Mary Elizabeth Herzog, a citizen of the United States, on October 13, 1960 and obtained a nonquota immigrant status based on the marriage; he then filed an application for adjustment of status under section 245 of the Act (8 USC 1255 (Supp. 1963)). The application was granted on February 1, 1961; on February 17, 1961 he filed for divorce, receiving an interlocutory decree on March 3, 1961, and a final one about a year later.

The Service seeks to rescind the adjustment of status on the ground that the immigrant visa required by section 245 of the Act was not available to respondent at

ATTACHMENT I

the time he was granted the adjustment: The quota for Iran was oversubscribed on February 1, 1961, and his nonquota immigrant status had been invalidly procured because the marriage on which it was based had been entered into solely for the purpose of evading the immigration laws and such a marriage cannot confer benefits under the immigration laws. The facts concerning the marriage are fully stated by the special inquiry officer. Briefly, the Service relies upon testimony of Mary and her parents, respondent's poor credibility and the fact that respondent had not lived with Mary. The respondent contends that he married his wife because he loved her and that he had not lived with her first, because as had been agreed between them, they were to live apart until he, a Moslem, secured an inheritance he could not have received had it been known that he was married to a non-Moslem (pp. 16-18, 20); and second, because shortly after the marriage, the feelings of his wife and her parents toward him changed and he was made to feel unwanted; and his own feelings changed when he discovered both that his wife had been previously married twice (she had informed him that she had been married only once before) and that she had been in a mental institution (pp. 29-32, 35-6, 39-41, 142-6, 156).

The special inquiry officer found the respondent was not a credible witness. The conclusion is based both on his observation at the hearing, and evaluation of the actions of respondent: He did not enter a school of higher education but took employment although he obtained entry to attend a university; he falsely certified to the Service in December 1960 that he was a student and not working (Ex. 4; pp. 13, 28-9); he failed to show in his application for adjustment of status in January 1961 that he had been employed and that his wife was not living with him (Ex. 2; pp. 24-7); he had perjured himself at his divorce trial by stating that his wife had left him the day after the marriage al-

though it had been at his insistence that the parties had not lived together; he had tricked Mary into believing he had gone abroad.

Respondent explained his actions in failing to enroll at the university as follows: He had come to the United States to study political science at Utah State University but upon arrival, did not feel he had to enroll because he had not known English well enough and because his clothing and possessions were in a suitcase which had been lost on his arrival (apparently requiring him to live with his brother); he undertook to study English in San Francisco where his brother lived. Respondent's explanation hardly enhances his credibility. Respondent had some knowledge of English. He knew enough English to write out in English the answer to several questions in English on his certificate of eligibility for a student status executed before the consul in Germany (Ex. 6; p. 150). In this certificate respondent stated that his knowledge of English was inadequate and that the university to which he was going had accepted him for a full program in English; the university itself certified on the same form that extra help in English would be given if necessary (Ex. 6). Since respondent knew he needed help in pursuing a university program, and since he knew the university would help him, his failure to go to the university for the alleged reason that he needed help in English is an indication that he used the student route to gain entry.

Respondent explains his actions in taking employment without obtaining permission as the result of ignorance of the fact that permission was required. The explanation must be rejected in view of his deliberate concealment of the fact that he was working, in his application for adjustment of status and in his statements concerning his assets. Respondent's explanation of the false testimony he gave at the divorce proceeding was

that his answers were guided by gestures of his attorney (pp. 148-150). While many of the respondent's answers at the divorce trial were categorical, the specific information he gave in request to several of the questions reveals an understanding of English. Furthermore, it must be noted that respondent had been in the United States for over 16 months at the time. Respondent must assume responsibility for the false information he furnished at the divorce proceeding.

Respondent's attempt to deceive Mary into believing that he had returned to Iran after the divorce is explained by him at oral argument and at the hearing of October 17, 1963 as motivated by a desire to avoid harming her feelings. This explanation appears to have been an afterthought. At the hearing on October 17, 1963 he explained that he had attempted to give Mary the impression he was abroad so that she would leave him alone (p. 35).

Further reflection upon respondent's credibility is his testimony that he hid the fact of his marriage from his brother because he feared that the brother would use such information to obtain the inheritance for himself (p. 20). Despite this fear, the respondent used his brother as a witness in the divorce proceeding in March 1961 (Ex. 17) although the inheritance was still not his and would not be his until the end of 1961 (p. 151). We believe the special inquiry officer's finding that the respondent is not credible is fully justified.

At oral argument respondent attempted to cast doubt upon Mary's credibility. She testified that respondent had instructed her to inform Service investigators falsely, if they should question her, that he was living with her at her parents' home (pp. 59-60). Respondent claims that Mary's testimony is incredible

since the address he had shown in his application for adjustment of status was not the address of Mary's parents but the address at which he had actually been living and therefore, the address at which investigation would have been made." Respondent overlooks, however, the fact that the visa petition filed by his wife reveals that she was living with her parents and that respondent's address was the same (Ex. 3). Since respondent had never lived with his wife at that address, it is reasonable to accept Mary's testimony concerning the instructions the respondent had given her. (It is to be taken into consideration in evaluating Mary's testimony that although she declined to appear until subpoenaed by the Service, she testified in a manner very hostile to respondent (p. 65).)

At the hearing evidence was introduced to establish that the law of Iran did not prevent a Moslem from inheriting money even though he were married to a non-Moslem. At oral argument, the respondent's position, stated rather confusedly, appears to be that it was not because of Iranian law that he feared to make known his marriage to a non-Moslem but because his grandfather had imposed a condition that the money go to the oldest son, only if the oldest son were married to a Moslem. The explanation appears an afterthought to evade the force of the Service evidence. The testimony of Mary and her parents makes no mention of the fact that the condition had been imposed by the grandfather nor does the respondent's explanations at the hearing refer to the grandfather. Even if the explanation is true, the fact that respondent resorted to subterfuge in his effort to obtain his inheritance is further indication that he lacks credibility.

Respondent, further attacking Mary's credibility, contrasts Mary's alleged recall of events that happened four years ago and her alleged inability to remember that eight months prior to the hearing she had signed

a statement. No citation is made to a specific portion of the record; however, we believe that respondent may have reference either to the fact that Mary testified that she remembered signing the visa petition in October 1960 but could not recall using the red ink in which the signature appeared (pp. 69-70), or to the only statement of recent date signed by Mary - the sworn statement taken from her on January 6, 1963 (Ex. 14). Mary stated that she could not recall signing this sworn statement; her attempt to explain about the signing was cut short (p. 66), but she did recall initialing each page (pp. 65-66). We believe that Mary revealed a good ability to recall events concerning which she testified; we find no unusual contrast between ability to recall distant and present events; moreover, her testimony is in essential part corroborated by her parents.

We believe the Service has established that the respondent's marriage was entered into solely for the purpose of enabling him to adjust his immigration status. Such a marriage is not valid to confer benefits under the immigration laws (Matter of M-, 9 I&N Dec. 217). Respondent was not entitled to a nonquota status. He was not eligible for the issuance of a visa at the time he received his adjustment of status; he was, therefore, ineligible for the relief he obtained. The appeal will be dismissed.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

Chairman

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File: A12 269 354 - San Francisco, California

In The Matter Of)

AHMAD WAZIRI)
)
Respondent)

IN RESCISSION PROCEEDINGS UNDER SECTION 246
OF THE IMMIGRATION AND NATIONALITY ACT

IN BEHALF OF RESPONDENT:

William C. Wunsch, Esq.
51 California Street
San Francisco, California

IN BEHALF OF THE SERVICE:

Stephen M. Suffin, Esq.
Trial Attorney
San Francisco, California

DECISION OF THE SPECIAL INQUIRY OFFICER

The respondent was admitted to the United States as a nonimmigrant student on October 24, 1959. On October 13, 1960, he was married to Mary Elizabeth Herzog, a citizen of the United States. On the basis of this marriage he acquired nonquota status. Thereafter he applied for and was granted the status of a permanent resident under the provisions of Section 245.

On April 8, 1964, I entered a decision in this case finding that the respondent's marriage was not a bona fide one and had been entered into solely to obtain benefits under the immigration laws, and ordered that the status of permanent resident granted the respondent pursuant to the provisions of Section 245 of the Immigration and Nationality Act, be rescinded. On July 24, 1964, the Board of Immigration Appeals dismissed his appeal from that decision. The respondent then employed new counsel who filed a motion to

reopen so that additional evidence could be adduced. On January 15, 1965, the Board granted the motion.

At the hearing before me on December 9, 1963, Mary had testified, among other things, that she had met the respondent at a New Year's dance in January, 1960, and then she saw him once or twice a week. In response to the question of how long this relationship had gone on, she answered, "Well, I don't know, maybe three months, something like that. Then he left maybe for three months, then he had called me at my place of work and insisted on seeing me somewhere in that vicinity." (Tr. p. 48) When questioned about the period when he was away, she testified, "I don't know. I don't know how long he was gone. It was approximately three months I had not seen him because I don't know exactly how long he was gone - or somewhere like that." (Tr.p.49) She concluded this phase of her testimony by saying, in response to a question as to how soon they had married after his return, "Oh, the next day or a couple of days after that. It was very fast." (Tr. p.49)

Present counsel contended in his motion that this portion of Mary's testimony was unbelievable. He pointed out that between the time she met the respondent and their marriage there was in total a three-month period of dating and a three-month period when she did not see the respondent, whereas the evidence showed that over nine months elapsed between their meeting and marriage. The respondent had testified that he had seen Mary about once a week from the time he met her until they were married. At the reopened hearing to show that Mary had seen the respondent during the summer of 1960, when the respondent had supposedly absented himself, he called as his first witness, Mabelle

Waziri, the respondent's brother. Huschang Waziri testified that his brother lived with him at Los Altos, California, from the time of his arrival in the United States in October, 1959, until sometime in February, 1960, when his brother went to Palo Alto, California, to live. He saw Mary at his own home and his brother's residence on Saturday mornings when he went there to visit. He saw her there in June or July of 1960.

Another witness was Mrs. Jean Harmon Whiteman, a friend of the respondent. Mrs. Whiteman testified that she first made the respondent's acquaintance early in 1960, when he was living with his brother in Los Altos. In the spring of 1960 he moved to Palo Alto. On her way from work, once in a while, she would step in to see how he was getting along. This continued until September of 1960. During these visits she saw Mary twice, but did not speak to her. This took place in the summer of 1960, most likely in July or August or possibly in September. She identified a film strip taken of herself, which also bears a later sequence in which Mary appears, as having been taken between July and September, 1960. She associates having seen Mary at the respondent's residence during the summer because the foliage was the summer type of foliage rather than fresh green of spring, and she is of the opinion that the sequence of the film in which she appears was taken in the summertime because of the state of her tan.

The respondent testified that the film strip in question was taken between July and September, 1960.

Mary had previously been married to one, Jack Caruso. This marriage had been entered into on May 28, 1960 and was terminated when Mary obtained an

annulment on July 14, 1960. In his motion counsel [illegible] three noteworthy similarities in Caruso's and the respondent's [illegible] experiences with Mary as follows: "(1) the fact that Mary proposed marriage in each instance; (2) Mary's marked cooling of affection immediately after each marriage; (3) Mary's unstable behavior immediately after each marriage; (4) the manifestation immediately after each marriage of Mary's neurotic dependence on her parents."

Counsel called Caruso as a witness. This witness, who has been married four times and is presently divorced, testified that he first met Mary in 1958 at a dance. Thereafter he dated her about two times a week for a period of two or three months. In the early spring of 1960 he resumed his dating, which took place about two times a week. About three or four months later Mary asked him to marry her, and they were married on May 28, 1960 at Reno, Nevada. Thereafter they moved into the house of Mary's parents. They had their own bedroom and engaged in marital relations. After three weeks she felt that the marriage was a mistake, wanted to get an annulment, and to call the whole thing off. He left her parents' home on June 18, 1960. During the time he lived with her she was home every evening.

It is obvious from Mary's testimony that she was not attempting to be precise and that her estimates of the periods during which the respondent dated her and during which he disappeared were rough approximations of the sequence of events. Neither the Trial Attorney nor respondent's then counsel apparently considered the discrepancies important since the matter was not pursued.

Testimony as to events which have taken place sometime in the past, is [illegible]-

riously inexact; particularly when no attempt is made to pinpoint it. Indeed, the testimony of the respondent's own witness illustrates this. Caruso testified that he had resumed his dating with Mary in the early spring of 1960, and that three or four months later Mary had asked him to marry her, and they were married on May 28, 1960. From March 21, 1960, the earliest date of spring, to May 28, 1960 is obviously less than three or four months. As another example, Huschang Waziri testified that his brother moved to Palo Alto in February, 1960, whereas Mrs. Whiteman testified that he had moved in the spring of 1960. The discrepancies in the testimony of these witnesses are of no particular consequence and I only mention them because counsel has stressed the discrepancies in Mary's testimony.

I hardly think the matter important, but even if I did, I do not find that the evidence presented to show that Mary had been seen with Waziri in the summer of 1960, particularly impressive. Huschang Waziri admitted that his memory was poor. He had been visiting his brother's residence regularly after his brother had moved and seen Mary there on many occasions. That he could fix with any sort of definiteness the times that he had seen Mary at his brother's residence is open to serious question.

Mrs. Whiteman had fixed the time that she saw Mary at respondent's residence as having occurred during July, August or September of 1960. I have grave doubts as to the accuracy of her testimony concerning a person whom she saw casually more than four years before, particularly when the time of such occurrence is predicated on such an ephemeral thing as the greenness of the foliage at that time of the year. Her identifying the film strip as having

been taken in July or August based on the state of her tan is hardly probative, either. The summer swimming season in the area of San Francisco very often starts in April.

Mary's testimony did not reflect the alleged similarities in her marital experiences with Caruso and the respondent. She testified that after her marriage to the respondent her affections had not changed, the respondent's had. The record establishes that it was he, not she, who sought the divorce. As pointed out, in effect, by the Trial Attorney in his brief of December 10, 1964, in opposition to the motion to reopen, Mary's marriage to Caruso supports her testimony that there was a period between January, 1960 and October 13, 1960, when Mary did not see the respondent.

At the time the respondent entered the United States he was destined to Utah State University. He never attended that school. Testimony was taken and documentary evidence presented for the purpose of amplifying the respondent's reasons why he had failed to do so. According to his testimony, when he arrived in the United States he found that his suitcases containing his clothes had not followed him. He engaged an attorney to look into the matter. This attorney subsequently obtained reimbursement for the loss of the suitcases in the sum of $330. He gave as his reasons for not attending the university the fact that he had lost his suitcases and thus could not afford to go to that school, but because his English was poor he also attend other local schools. The Form I-20 which the respondent executed showed that his knowledge of the English language was inadequate, but that the institution to which he was destined was equipped to offer and

had accepted him expressly for a full program of study of English. This form also shows that he was going to receive $175 monthly from his parents and sponsor. I cannot understand why the respondent could not have gone to school while his attorney was attending to the matter of his last citizen, and why he could not have used the $175 monthly to support himself while attending school.

I might add that the Form I-20, which he presented to obtain his student visa, expressly states that if after being admitted, a student desired to transfer to another school, college or educational institution other than that specified at the time of his admission, the student must make a written application in advance to the nearest immigration office for permission to make such a transfer. He never made such application. The form also states that no student admitted to the United States may be employed for a wage or a salary unless permission to do so had been granted by the Service. The respondent did not ask for such permission before engaging in employment.

The respondent had testified at the original hearing that if he married a non-Moslem he would lose his inheritance. It appeared to me that the respondent attributed the fact that he would lose such inheritance to the laws of Iran. At the reopened hearing it developed, however, that he would lose the inheritance only because of the provisions of the will of his grandfather. This clarification of this matter does the respondent no credit. It appears from the terms of this will that when the respondent married Mary he was no longer entitled to the inheritance. He concealed the marriage so he would not lose it. As the Board pointed out in its decision of July 24, 1964, the

fact that he "resorted to subterfuge in his effort to obtain his inheritance is further indication that he lacks credibility."

Counsel also requested that I consider other matters raised by him in his motion. In his motion he states, "It is extraordinary that neither Mary's mother nor her father in their testimony took any note of her marriage to Caruso which occurred during the very period of time that they testified that Mary was concerned with maintaining her relationship with respondent. Mary's mother not only avoided any mention of Mary's marriage to Caruso but made the remarkable comment that during the period of Mary's relationship with respondent she had no other friends."

Mary's mother did not mention the Caruso marriage in her testimony for the simple reason that she was not asked concerning it. Mary's father did mention the marriage. (Tr. 98) Mary's mother's testimony that Mary had no other friends than the respondent obviously relates to the time when she was going with the respondent.

Counsel further remarks that "in her application for a license to marry respondent, Mary stated that she had been married only once before and did not mention her marriage to Caruso. In her petition to classify respondent for issuance of immigration visa Mary also failed to mention her marriage to Caruso. It is obvious that she endeavored to conceal her marriage to Caruso from respondent, and her testimony that she told him all about it prior to their marriage is incredible." Mary testified to the effect that she did not understand whether a marriage which was annulled was considered a marriage; consequently she could, in good faith, not have mentioned it

marriage to Caruso in either her application for a license or in the visa petition. In any event, it is not obvious from her failure to list both her marriages in those documents that she did so to conceal her marriage to Caruso.

In my decision of April 8, 1964, I found the respondent to be a trickster and prevaricator who had married Mary solely to obtain benefits under the immigration laws. None of the evidence adduced at the reopened hearing persuades me that these findings were in error. If ever there was a case of a fraudulent marriage, this is it. No change will be made in my previous order.

IT IS ORDERED that no change be made in my decision of April 8, 1964, rescinding the status of permanent resident granted to the respondent pursuant to the provisions of Section 245 of the Immigration and Nationality Act.

Chester Siplkin
Special Inquiry Officer

LL

UNITED STATES [illegible]
Immigration and Naturalization Service

MATTER OF ABID WAZIRI Respondent	TITLE : [illegible] 30 - [illegible] California IN EXCLUSION [illegible]

Before Special Inquiry Officer Chester Bird

Hearing held on April 2, 1965 at 630 Sansome Street, San Francisco, California

Recorded by Lula Brondz Transcribed by Lula [illegible]

Official Interpreter None Language Turkish

IN BEHALF OF SERVICE:

Stephen M. Suffin, Esq.
Name

Trial Attorney
Title

San Francisco, California

IN BEHALF OF RESPONDENT:

William C. Worsch, Esq.

354 California Street

San Francisco, California

I hereby certify that to the best of my knowledge and belief the following pages numbered 1 through 232 are a complete and accurate [illegible] of the above-entitled hearing.

[signature]

[illegible]
Official Reporter

4-12-65
Date

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals

JAN 15 1965

File: A-12269334 - San Francisco

In re: AHMAD WAZIRI

IN RESCISSION PROCEEDINGS UNDER SECTION 246 OF THE IMMIGRATION AND NATIONALITY ACT

MOTION

ON BEHALF OF RESPONDENT: William C. Wunsch, Esq.
Faulkner, Sheehan & Wiseman
351 California Street
San Francisco, California

ON BEHALF OF I&N SERVICE: Stephen M. Suffin
Trial Attorney
(Brief filed)

The case comes forward pursuant to a motion of counsel for the respondent requesting that the proceedings be reopened on the ground that material new evidence not previously available to respondent is now available to show his good faith in entering into the marriage.

The record relates to a native and citizen of Iran, 38 years old, male, who was admitted to the United States as a student for a period of one year on October 24, 1959. He did not enter school but took employment in January 1960. He married Mary Elizabeth Herzog, a United States citizen, on October 13, 1960 and obtained a nonquota immigrant status based on that marriage and also obtained an adjustment of status under Section 245 of the Immigration and Nationality Act on February 1, 1961. On February 17, 1961 he filed for a divorce, receiving an interlocutory decree on March 3, 1961 which became final about a year later.

On April 8, 1964 the special inquiry officer, in rescission proceedings under Section 246 of the Immigration and Nationality Act, ordered that the status of permanent residence granted the respondent pursuant

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to the provisions of Section 245 of the Immigration and Nationality Act be rescinded. On July 24, 1964 we dismissed the appeal from the order of the special inquiry officer. The conclusion that the respondent's marriage was entered into solely for the purpose of enabling him to adjust his immigration status and that such a marriage was not valid to confer benefits under the immigration laws was reached after weighing the credibility of the testimony of the respondent, the fact that he never lived with her and the adverse testimony of the respondent's wife, Mary Elizabeth Herzog, and her parents.

The instant motion to reopen sets forth that a witness, Jack Caruso, a prior husband of Mary Elizabeth Herzog has become available and sets forth his affidavit regarding his relationship with the respondent's wife and takes issue with her statement that the marriage was not consummated or that she did not know his brother. The motion also contains a copy and a translation of an Iranian decision that the respondent was entitled to the inheritance about which he had testified and states that a further explanation would be made in the event a reopened hearing was granted; a letter from the transportation company regarding the delay in settling the respondent's claim in respect to his lost luggage; an affidavit of respondent's brother, Huschang Waziri, regarding the respondent's arrival in the United States, his loss of luggage, his language difficulty and the fact that he met Mary Elizabeth Herzog on numerous occasions during 1960. The motion further sets forth that the respondent had a language problem and was unable to pass the standard college entrance examination in English in the summer of 1960 and offers to explain his failure to enroll at Utah State University.

Our prior decision in this case was based upon weighing the credibility of the respondent's testimony regarding the various events, including his failure to attend the university after admission as a student, failure to live with his wife, and various other unfavorable aspects of his testimony together with the adverse testimony of Mary Elizabeth

Herzog, the respondent's citizen wife, and her parents. The motion sets forth new material which seeks to overcome the adverse effect of the credibility with which respondent's testimony was received. Upon a full consideration of all of the matters set forth in the motion to reopen, the motion to reopen will be granted. The granting of the motion should not be taken as a belief in the matters set forth therein but a new decision should be rendered on the basis of the additional evidence adduced at a reopened hearing.

ORDER: It is ordered that the prior order of this Board dated July 24, 1964 be withdrawn.

IT IS FURTHER ORDERED that the proceedings be reopened to receive additional testimony and evidence bearing on the bona fides of the marriage and for such other action that may appear appropriate.

Thos. S. Trimmer
Chairman

Memorandum

TO : Chairman, Board of Immigration Appeals, Washington, D. C.

DATE: December 14, 1964

FROM : C. W. Fullilove, District Director, San Francisco, California

SUBJECT: Ahmad Waziri, A12 269 334.

Subject record file is forwarded for consideration of the respondent's attorney's motion for reopening of proceedings for recission of adjustment of status under Section 246 of the Immigration and Nationality Act.

The respondent is not in custody and his deportation is not imminent.

C W Fullilove

attachment:

Record of proceedings

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